



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF CWCI- INC.

DATE: AUG. 1, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a software consulting and development business, seeks to permanently employ the Beneficiary in the United States as a software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition on February 9, 2016. The Director determined that the Petitioner had petitioned for numerous beneficiaries and had not established its ability to pay the proffered wage each of those beneficiaries, and, therefore, could not establish its ability to pay the wage offered to the instant Beneficiary.

The matter is now before us on appeal. The Petitioner asserts that several of the additional beneficiaries that were named by the Director had obtained lawful permanent residency and that it had withdrawn several of the additional petitions. The Petitioner states that it has established its ability to pay the proffered wage based upon the wages it paid to the beneficiaries of its petitions, plus its combined net income and net current assets. Upon *de novo* review, we will dismiss the appeal.

## I. LAW AND ANALYSIS

At issue in this case is whether or not the Petitioner has the ability to pay the Beneficiary's proffered wage as well as the wages proffered to the Petitioner's other sponsored workers, as of the priority date of the current petition and continuing until the Beneficiary obtains lawful permanent residence. As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL).<sup>1</sup> The priority date of the petition is May 5, 2014.<sup>2</sup> The proffered wage as stated on the labor certification is \$77,875 per year.

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<sup>1</sup> *See* section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

<sup>2</sup> The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

On the petition, the Petitioner claimed to have been established in 2006, to have a gross annual income of \$2.5 million, and to currently employ 42 workers. In determining a petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. The Petitioner did not claim to have employed the Beneficiary in 2014, but provided copies of an IRS Form W-2, Wage and Tax Statement, reflecting that it paid the Beneficiary \$48,135 in 2015. The Petitioner must establish that it can pay the full proffered wage of \$77,875 to the Beneficiary in 2014. For 2015, the Petitioner must establish that it can pay the difference between the proffered wage and the wages actually paid to the Beneficiary, that is, \$29,740. As the Petitioner has filed multiple petitions, it must also establish it is able to pay the wages proffered to all of its sponsored workers for the relevant time period.

If a petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return. As an alternate means of determining a petitioner's ability to pay the proffered wage, USCIS may review a petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The Petitioner's tax returns demonstrate the following end-of-year net income and net current assets:

	Net Income <sup>3</sup>	Net Current Assets <sup>4</sup>
2014	\$91,365	\$265,127
2015	\$178,161	\$298,257

While the Petitioner's net income and net current assets would be greater than the difference between the wage offered and the wages actually paid to this Beneficiary, USCIS records indicate that the Petitioner has filed Form I-140 petitions on behalf of numerous other beneficiaries in addition to the current Beneficiary. The Petitioner would need to demonstrate its ability to pay the proffered wage for each of these I-140 beneficiaries from the priority date of the current petition until each beneficiary obtains permanent residence. See 8 C.F.R. § 204.5(g)(2). In determining whether a petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition.<sup>5</sup> See *Patel v. Johnson*, 2 F.Supp.3d 108 (D. Mass. 2014).

The Director issued a request for evidence (RFE), on August 13, 2015, and requested that the Petitioner submit the receipt number, beneficiary name, offered wage, and priority date for each Form I-140 petition it had filed, in addition, the Director requested the Petitioner to show the status or each petition and whether each beneficiary had adjusted to permanent resident status. Finally, the Director requested that the Petitioner provide evidence showing evidence of wages paid to each beneficiary.

In response to the RFE, the Petitioner provided partial information regarding its other Form I-140 immigrant petitions. The Director determined that the Petitioner did not establish its ability to pay the wages proffered to its other beneficiaries and denied the current petition. Specifically, the Director noted that the Petitioner had not submitted information regarding the beneficiaries of several of its petitions and determined that even the limited information that was provided shows that the difference between the wages proffered and the wages actually paid was at least \$174,419.36 in 2014 and \$148,966.66 in 2015.

On appeal, the Petitioner states that two of the other beneficiaries had adjusted to permanent resident status and that it had withdrawn two of its other petitions, and that those beneficiaries should not be

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<sup>3</sup>For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return.

<sup>4</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

<sup>5</sup> However, the wages offered to the other beneficiaries are not considered after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider a petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage. Finally, wages paid to a beneficiary in excess of the wage proffered to that beneficiary are not considered funds that are available to pay the wages proffered to a different beneficiary.

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included in the calculation of its ability to pay the proffered wages. The Petitioner names one other beneficiary who had not been identified by the Director, and states that only eleven petitions remained pending, including the current petition.

On appeal, the Petitioner submits evidence that beneficiaries J.D. and R.V. adjusted to permanent resident status in 2014 and 2015, respectively. The Petitioner also submits evidence that it withdrew its petitions for beneficiaries N.G. in 2015 and P.I. in 2016. The Petitioner still bears the burden to establish its ability to pay the wages offered to those beneficiaries from the priority date of the current petition until each of those petitions was denied or withdrawn or until the beneficiary adjusted to permanent resident status. The Petitioner submitted evidence that it paid beneficiary J.D. in excess of the proffered wage in 2014. However, the Petitioner did not submit evidence of wages paid to R.V. in 2014, to P.I. in 2014 or 2015, or to N.G. in 2014 and until it withdrew that petition on October 19, 2015. The Petitioner did not submit evidence of the wages paid to these beneficiaries up until the dates their petitions were withdrawn or until they adjusted to permanent resident status, which prevents us from making a full analysis of the Petitioner's ability to pay the proffered wage.

Moreover, even if we overlook the missing wage documentation for the beneficiaries whose petitions were withdrawn and for the beneficiaries who adjusted to permanent resident status, the evidence of record would still be insufficient to establish the Petitioner's ability to pay the proffered wages to the remaining beneficiaries. In 2014 the Petitioner paid less than the proffered wage to beneficiaries K.L., V.S., P.I., S.M., K.K., A.S., N.G., and the current Beneficiary. These shortfalls total \$356,610.78. In 2015 the Petitioner paid less than the proffered wage to beneficiaries K.L., V.S., P.I., S.M., K.K., A.S., and the current Beneficiary. These shortfalls total \$154,447.70. Thus, the Petitioner did not have sufficient net income or net current assets in 2014 to pay the difference between the wages proffered to the beneficiaries of its petitions and the wages actually paid to those beneficiaries already identified by the Director and the Petitioner.<sup>6</sup>

<sup>6</sup> In addition, USCIS records reveal additional petitions filed by the Petitioner, but not previously identified by the Director or the Petitioner. Specifically, records reveal the following:

Beneficiary	Receipt Number	Receipt Date
S.P.		04/27/16
S.N.		04/15/16
R.C.		04/15/16
D.K.		01/12/16
K.P.		06/04/16
S.M.		06/17/13
P.C.		11/06/12
P.C.		1/17/16

The evidence in the record does not document the priority date, proffered wage and wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, and whether any of the other beneficiaries have obtained lawful permanent residence. The Petitioner's ability to pay the wages proffered to these additional beneficiaries must be examined in any further proceedings.

The Petitioner advocates combining its net income with its net current assets to demonstrate its ability to pay the proffered wage. We cannot use this approach because we do not view net income and net current assets to be cumulative. We view net income and net current assets as two different methods of demonstrating the ability to pay the wage, one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Given that net income is retrospective and net current assets are prospective in nature, we do not agree with the Petitioner that the two figures can be combined in a meaningful way to illustrate its ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable.

USCIS may also consider the overall magnitude of a petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage. Here, unlike the petitioner in *Sonogawa*, the Petitioner has not demonstrated its reputation within its industry, the occurrence of any uncharacteristic business expenses or losses, and has not claimed that the Beneficiary will be replacing a former employee. Furthermore, since the Petitioner has provided financial documentation for only two years we are unable to determine any patterns of historical growth or development of the business. Additionally, without the requested information related to all of the Petitioner's multiple filings, we are unable to determine the total difference between wages paid and proffered wages and whether the Petitioner's complete totality would merit a positive *Sonogawa* determination.

Considering the totality of the circumstances, the Petitioner has not demonstrated its ability to pay all of the proffered wages beginning on the priority date and continuing to the present. Therefore, from the date the labor certification was accepted for processing by the DOL, the Petitioner has not established that it had the continuing ability to pay the wages proffered to the beneficiaries of its petitions.

## II. CONCLUSION

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of CWCI- Inc.*, ID# 18364 (AAO Aug. 1, 2016)